Due service and receipt of a copy of the within is hereby admitted

this_____day of November, 1934.

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Proctors for Respondent.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1934

Nos. 424 and 425

HILDEGARD SCHOENAMSGRUBER, by Gustav Schoenamsgruber, her guardian,
Petitioner,

vs.

THE HAMBURG AMERICAN LINE (a corporation), Claimant of the Motorship "The Oakland", her engines, etc.,
Respondent,

and

GUSTAV SCHOENAMSGRUBER,
Petitioner,

vs.

THE HAMBURG AMERICAN LINE (a corporation), Claimant of the Motorship "The Oakland", her engines, etc.,
Respondent.

SUPPLEMENTAL BRIEF FOR PETITIONERS.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petitioners herein most respectfully ask leave to file this supplemental brief for the reason that since the filing of our opening brief a decision has been rendered by this Court, which, we submit, disposes of the main question here involved, favorably to the contentions of petitioners.

THE COURT BELOW (70 Fed. 2d 234) DISMISSED THE APPEAL OF PETITIONERS FROM AN ORDER OF THE DISTRICT COURT DIRECTING THE PARTIES TO PROCEED TO ARBITRATION AND STAYING TRIAL PENDING SUCH ARBITRATION (Apostles on Appeal, page 88) ON THE GROUND THAT THE ORDER IN QUESTION WAS AN INTERLOCUTORY ORDER AND HENCE NON-APPEALABLE.

This Honorable Court thereafter granted a writ of certiorari (79 Law. Ed. 113), the date of the order being October 22, 1934. In our opening brief, since the order granting the writ did not limit the consideration to any particular question or questions, we briefed the merits of the case, contending, among other things, that the arbitration agreement set forth by respondents in their answer, and on the basis of which the District Court ordered the parties to proceed to arbitration and stayed proceedings pending the same, (1) was void as an attempted ouster of the jurisdiction of the Courts, (2) was against public policy as an attempt by the carrier to exempt itself from liability for

torts and to compound the crimes committed by its servants against its passengers, and (3) that, in any event, it was not binding upon Hildegard Schoenamsgruber, a minor.

We further argued that the order directing the parties to proceed to arbitration and providing "that until such arbitration has been had and the award of the arbitrator filed herein, the trial of the action herein and further proceedings herein are hereby stayed", **was a final order and therefore appealable.**

(See *Apostles on Appeal,* page 85.)

This question is discussed in the opening brief for petitioners, pages 10-17.

Our opening brief was filed with the clerk of this Court November 24, 1934. The brief for respondents bears date of January 2, 1935.

THE DECISION OF THIS COURT IN SHANFEROKE COAL & SUPPLY CORP. v. WESTCHESTER SERVICE CORPORATION, ARGUED IN THIS COURT DECEMBER 7, 1934, AND DECIDED JANUARY 7, 1935 (79 Law. Ed. 269), HOLDS THAT AN ORDER GRANTING A STAY PENDING ARBITRATION IS AN APPEALABLE ORDER.

The opinion of Mr. Justice Brandeis in this last mentioned case, decided since the filing of all the briefs herein, holds specifically that an order such as the one in question is appealable, not as a final order in the cause, but as an order in the nature of a decree granting an injunction from which an appeal lies under Section 129 of the Judicial Code. (28 U. S. C. A. 227.)

Bearing in mind that the order appealed from in the present case granted a stay, and also that the arbitration agreement was pleaded in the answer of the respondents as a defense, the language of Justice Brandeis is, we submit, decisive of the question of the appealable character of the order in the case at bar:

> "The order of the District Court denying the stay was not a final judgment appealable under Section 128 of the Judicial Code, U. S. C. A. title 28, Section 225. Being an interlocutory order, it was appealable to the Circuit Court of Appeals under Section 129, only if the denial of the stay should be deemed the denial of an injunction. Compare *General Electric Co. v. Marvel Rare Metals Co.*, 287 U. S. 430, 432, 77 L. Ed. 408, 411, 53 S. Ct. 202. That question we must first determine although it was not raised below or by counsel here. See *Mansfield, C. & L. M. R. Co. v. Swan,* 111 U. S. 379, 382, 28 L. Ed. 462, 463, 4 S. Ct. 510. For the reasons stated in *Enelow v. New York L. Ins. Co.,* No. 47, decided this day (..... U. S. ....., ante, 247, 55 S. Ct. .....) *an order granting or denying a stay based on an equitable defense or cross-bill interposed in an action at law under Section 274b, U. S. C. A. title 28, Section 398, is appealable under Section 129. We are of the opinion that the special defense setting up the arbitration agreement is an equitable defense or cross-bill within the meaning of Section 274-b;* and that the motion for a stay is an application for an interlocutory injunction based on the special defense. Compare *Red Cross Line v. Atlantic Fruit Co.,* 264 U. S. 109, 121, 68 L. Ed. 582, 585, 44 S. Ct. 274. As bearing on this question of jurisdiction on appeal it is immaterial

> whether or not the terms of the contract sued on would preclude entry in a federal court of a decree for specific performance of the arbitration. Since the appeal here in question was taken within thirty days from the entry of the order denying the stay, the Court of Appeals had jurisdiction under Section 129."

Since this Court has held that an order **denying** a stay is equivalent to the denial of an injunction, it follows inevitably that **an order granting a stay should be deemed an order granting an injunction** within the meaning of Section 129.

CONCLUSION.

We therefore respectfully submit that the question as to the appealable character of the order has been set at rest by this Honorable Court, and that the judgment of the Circuit Court of Appeals should be reversed and the cause remanded with directions to the Honorable Court below to hear and determine the appeals herein on their merits.

Dated, San Francisco, California,
January 30, 1935.

HARRY H. SEMMES,
VINCENT W. HALLINAN,
EMMETT R. BURNS,
WILLIAM F. HERRON,
Proctors for Petitioners.